

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

THOMAS KELLY,)	
)	
Plaintiff)	
)	
v.)	Civil No. 89-0013 P
)	
UNITED TECHNOLOGIES, et al.,)	
)	
Defendants)	

RECOMMENDED DECISION ON MOTION TO DISMISS OF BASF CORPORATION

Before the court is the motion to dismiss of BASF Corporation ("BASF"). Two grounds are asserted: (1) insufficiency of process (Fed. R. Civ. P. 12(b)(4)), and (2) failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)).

This action was commenced in the Maine Superior Court for Cumberland County on October 7, 1988. The original complaint did not name BASF as a party. On November 17, 1988, after the action was removed to this court by United Technologies, BASF was served with an amended complaint naming BASF as a party defendant and bearing a Maine Superior Court caption. The amended complaint had not been filed in Superior Court prior to the removal. Instead, it was tendered for filing in this court on November 25, 1988. Subsequent to the filing by BASF on January 11, 1989 of its motion to dismiss, the plaintiff filed in this court a motion to amend the complaint to permit him to proceed upon the amended complaint.¹ That motion was granted without objection at a status conference held on March 15, 1989. Thereafter, at the same conference, BASF advised the court that it continues to seek a ruling on its motion to dismiss in order to clarify whether or not it had been properly joined to that date.

¹ It is undisputed that, because the plaintiff did not file the amended complaint before a responsive pleading had been served, the plaintiff was entitled to amend his complaint only by leave of court or by written consent of the adverse parties. Fed. R. Civ. P. 15(a).

As a result of a 1966 amendment to Fed. R. Civ. P. 15(c), the relation back effect of an amendment made pursuant to Rule 15(a) was explicitly extended to include "[a]n amendment changing the party against whom a claim is asserted" provided that the claim asserted in the amended complaint "arose out of the conduct, transaction, or occurrence set forth . . . in the original [complaint]" and

within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defenses on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed. R. Civ. P. 15(c); Notes of Advisory Committee on Rules; 6 C. Wright & A. Miller, Federal Practice and Procedure ' 1479 at p. 402 (1971).

Since the original and amended complaints are identical in all respects except for the inclusion in the latter of BASF as a party defendant, it is clear that the claims asserted in the amended complaint arose out of the conduct, transaction, or occurrence set forth in the original complaint. Likewise, because BASF was served with the amended complaint only 41 days after the action was commenced and will be entitled to file an answer if the court denies its motion to dismiss, Fed. R. Civ. P. 12(a), it cannot claim (and has not claimed) prejudice in maintaining its defenses on the merits.² Finally, BASF does not claim that it did not know or should not have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it. The claims asserted by the plaintiff as they relate to BASF derive from alleged conduct of Inmont Corporation. Assumedly, the plaintiff originally believed United Technologies to be the corporate entity formerly known as Inmont Corporation and that soon after he commenced this action he came to understand that one or both of United Technologies and BASF were formerly known as Inmont

² Nor has BASF asserted that it received such notice only after the running of the applicable statute of limitations period.

Corporation. Since BASF apparently once owned Inmont Corporation,³ it is unlikely that it would not have expected this plaintiff to have asserted the pending claims against it in place of or along with United Technologies. Even allowing that the facts may in actuality differ from the way they appear on the basis of the present record, BASF has failed to argue that the relation back requirements of Rule 15(c) have not been satisfied or to support such an argument with a factual predicate.

For the foregoing reasons, I recommend that BASF's Motion to Dismiss be DENIED.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 16th day of May, 1989.

David M. Cohen
United States Magistrate

³ See Affidavit of Martin R. Lewis, Jr., Secretary of United Technologies Corporation, offered in support of United Technologies' Motion to Dismiss and/or for Summary Judgment granted without objection on May 12, 1989.